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December 20, 1993

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222, Stop Code 1170
Washington, DC 20554

Re: MM Docket No. 93-290

Dear Mr. Caton:

We are submitting herewith on behalf of Time Warner New York City Cable Group the original and four (4) copies of its Comments in the above-referenced rulemaking proceeding.

Should there be any questions concerning the Comments, please communicate with the undersigned.

Very truly yours,

John R. Wilner

John R. Wilner

JRW/jsa
Enclosures

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BEFORE THE

Federal Communications Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 76.51 of the)
Commission's Rules to Include)
Newton, New Jersey, and Riverhead,)
New York, in the New York,)
New York-Linden-Paterson-Newark,)
New Jersey Television Market)

MM Docket No. 93-290

**COMMENTS OF TIME WARNER
NEW YORK CITY CABLE GROUP**

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December 20, 1993

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SUMMARY

A petitioner for further hyphenation of a top-100 television market listed in Section 76.51 of the Rules must meet certain factual criteria established by the Commission to gauge the commonality of the proposed addition with the already designated components of the market. Mountain Broadcasting Corporation and WLIG-TV, Inc. have failed to make the requisite showings for Newton, New Jersey and Riverhead, New York, respectively. Nor has either petitioner demonstrated a "particularized need" for the relief requested or showed conclusively that the public interest, rather than their respective private interests in avoiding copyright liability indemnification to cable systems, would be served by further hyphenation of the New York-Linden-Paterson-Newark television market.

Located in rural northern New Jersey some 45 miles from New York City, Newton has nothing in common with the dominant city of the nation's largest television market. Furthermore, Station WMBC-TV's principal programming focus is northern New Jersey and there is no evidence that the Station's program schedule would be of any interest to residents of New York City, whose needs for news, public affairs and public service programming are well-met by local stations and cable systems.

The transmitting antenna site of Station WMBC-TV is not co-located with any other station in the present market. In addition, the Grade B contour of Station WMBC-TV is not co-extensive with the Grade B contours of the in-market stations and

the addition of Newton to the market would expand cable carriage of Station WMBC-TV well beyond its Grade B contour.

The possible additions of any, or all, of Secaucus, Bridgeport, Poughkeepsie, Kingston and Smithtown to the New York market cannot meaningfully be assessed in the absence of any information supporting these proposals. Accordingly, Time Warner New York City Cable Group reserves its right to comment upon these proposals in reply comments following its review of any comments filed in support.

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New York-Linden-Paterson-Newark,)
New Jersey Television Market)

MM Docket No. 93-290

To: Chief, Mass Media Bureau

COMMENTS OF TIME WARNER
NEW YORK CITY CABLE GROUP

Time Warner New York City Cable Group ("TWC"), by its attorneys, hereby submits its comments in response to the Commission's Notice of Proposed Rule Making in the above-captioned proceeding.^{1/} TWC is comprised of operating cable television systems Time Warner Cable of New York City, Queens Inner Unity Cable Systems, Paragon Cable Manhattan and Staten Island Cable, which provide cable television service to the Boroughs of Brooklyn (western), Manhattan, Queens and Staten Island, New York. For the reasons set forth hereinbelow, TWC opposes the proposed rehyphenation of the New York, New York-Linden-Paterson-Newark, New Jersey television market (the "New York Market" or "Market") to include Newton, New Jersey and Riverhead, New York, as well as other cities of license from among the following: Secaucus, New Jersey, Bridgeport,

^{1/} Notice of Proposed Rule Making, MM Docket No. 93-290, DA 93-1349 (released November 16, 1993) (herein "Notice").

Connecticut, Poughkeepsie, New York, Kingston, New York and Smithtown, New York.

TWC must emphasize at the outset the potential adverse impact upon its subscribers if TWC is compelled to add one or more television stations whose communities of license are on the fringes of the widespread and diverse New York Area of Dominant Influence (ADI) and have no meaningful ties to, or commonality with, New York City. In Manhattan, Queens and Brooklyn, TWC's 550 MHz cable systems are now filled to capacity. If all of the "qualified" stations operating in the New York ADI were to perfect their must-carry rights, TWC would be forced to dedicate approximately twenty (20) of its channels to carriage of such stations. Coupled with TWC's franchise requirements for nine (9) separate public, educational, government and leased access channels, the mandated addition of fringe market television stations would limit TWC's discretion in offering cable programming of interest and appeal to its subscribers and would force TWC to drop some of these services (e.g. C-SPAN, VISN, The International Channel, or, possibly, one or more local foreign language services). The loss of educational, informational, religious and/or ethnic programming of direct appeal to TWC's subscribers in order to accommodate remote television stations, whose programming is in no respect "local" to New York City, would unquestionably disserve the interests of TWC's subscribers.

I. Newton, New Jersey

A. Background

In response to a petition for rule making (the "Petition") filed by Mountain Broadcasting Corporation, licensee of Station WMBC-TV, Newton, New Jersey ("Mountain"), the Mass Media Bureau has proposed to add Newton as a designated city of the New York Market. As will be shown by TWC, Mountain's proposal fails to satisfy the Commission's established criteria for rehyphenating an existing market designation in Section 76.51 of the Rules^{2/} to include a new community. Furthermore, as will be shown, the relief requested by Mountain is unsupported by any other public interest factors.

B. The Proposal Fails to Meet the Commission's Criteria For Market Hyphenations

As set forth in the Notice,^{3/} the Commission's criteria for evaluating television market hyphenation proposals are well-settled, as follows:

- (1) the distance between the existing designated communities and the community proposed to be added to the designation;
- (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B coverage area;
- (3) the presence of a clear showing of particularized need by the requesting station; and
- (4) an indication of benefit to the public from the proposed change.

^{2/} 47 C.F.R. § 76.51.

^{3/} Notice at ¶ 3.

In the Petition, Mountain asserts that Newton is less than 45 miles from all of the currently designated communities in the New York Market, with the greatest distance being 44.73 miles to New York City and the closest 32.14 miles to Paterson, New Jersey.^{4/} Acknowledging that Newton is not immediately contiguous to any of the Market's other designated communities, Mountain relies upon the Mass Media Bureau's decision in Press Broadcasting Company, Inc. (Clermont, Florida)^{5/} as standing for the proposition that communities need not be "directly adjacent" to be considered in the same market.^{6/} What Mountain appears to have overlooked in the Press decision, however, is the fact that the transmitting antenna of the Clermont station (WKCF) is located on the same tower used by a television station licensed to Daytona Beach, one of the designated communities in the Orlando-Daytona Beach et al. market. The Mass Media Bureau found that this co-location alone "supports treating the two stations as part of the same television market",^{7/} and did not even

^{4/} Petition at fn. 9.

^{5/} 8 FCC Rcd 3667 (1993).

^{6/} Petition at 4 and 5.

^{7/} Press, 8 FCC Rcd at 3667. Whether a petitioner shares its transmitter site with an in-market station(s) is an important factor in market hyphenation cases. See Major Television Markets (Fresno-Visalia, CA), 57 R.R. 2d 1122, 1123 (1985) (station shares common transmitter site with other Fresno stations); MM Docket No. 93-218, Amendment of Section 76.51 of Rules (Clearwater, FL), 8 FCC Rcd 5069, 5070 n.8 (1993), (Notice of Proposed Rule Making) (final rule amendment released December 15, 1993, DA 93-1477) (station shares tower with an in-market station); MM Docket No. 93-
(continued...)

consider the mileage distances between the present and proposed communities in the market.^{8/} To the contrary, the transmitting antenna of Station WMBC-TV is not co-located with the antenna of any other station in the New York Market. Thus, Mountain's reliance upon Press is clearly misplaced.

The distance prong of the Commission's test for market hyphenation proposals must be addressed in the context of one overarching consideration: New York City is beyond question the linchpin of the New York Market by any possible measure. The other designated communities in the New York Market are reasonably proximate to New York City, with Newark the closest at about 9.4 miles and Linden the most distant at approximately 16 miles.^{9/} Thus, the currently designated New Jersey communities included in the New York Market are closely bound to the Market's hub by distance and regional considerations. To the contrary,

^{7/}(...continued)

207, Amendment of Section 76.51 of Rules (Riverside, CA), 8 FCC Rcd 4783, 4784 n.6 (1993), (Notice of Proposed Rule Making)(final rule amendment released December 7, 1993, DA 93-1444) (station shares tower with two in-market stations); See also, MM Docket No. 93-233, Amendment of Section 76.51 of Rules (Pine Bluff, AR), 8 FCC Rcd 5595, 5596 n.5 (1993), (Notice of Proposed Rule Making)(final rule amendment released November 30, 1993, DA 93-1429)(Pine Bluff stations' transmitters located in close proximity to in-market station). MFP, Inc. (Lawrence, MA), Notice of Proposed Rule Making, MM Docket No. 93-291 (released November 18, 1993) ¶ 6 (transmitter located in downtown Boston, the hub of the market).

^{8/} It is also noteworthy that no oppositions were filed to the rehyphenation proposal.

^{9/} These distances were calculated using the geographic coordinates listed in Attachment B of the Petition.

Mountain cannot claim for Newton, located in rural northern New Jersey almost 45 miles from New York City, any ties to the Market's preeminent city of license.

Mountain asserts that the Grade B contour of Station WMBC-TV "significantly overlaps" the comparable contours of stations licensed to the communities in the New York Market.^{10/} While TWC has not commissioned an engineering study to analyze the relevant Grade B contour coverages, two facts are clear from WMBC-TV's coverage map filed as Attachment C to the Petition. First, WMBC-TV's Grade B contour barely covers the eastern portions of New York City served by TWC, and no areas of New York City appear to fall within the Station's Grade A contour. Furthermore, WMBC-TV fails to provide Grade B contour coverage to any of Long Island and southern Connecticut and most of Westchester County, New York, all areas of which are within the New York ADI as defined by Arbitron and receive Grade B service from the stations in the New York Market.^{11/} In sum, WMBC-TV's Grade B contour plainly is not co-extensive with those of the New York Market stations, with large areas of the Market being unserved by Station WMBC-TV. Accordingly, should the Commission add Newton to the New York Market as proposed by Mountain, WMBC-TV would be allowed additional rights into substantial areas beyond its Grade B contour.

^{10/} Notice at ¶ 5.

^{11/} See Television & Cable Factbook, TV Stations 1993, Volume No. 61, at A-791-799.

Mountain is direct and upfront about its "particularized need" for the proposed market rehyphenation to incorporate Newton.^{12/} While the Commission's new must-carry rules afford WMBC-TV the right to carriage on all cable systems in the New York ADI, the Station is not considered a "local signal" throughout the ADI for purposes of the cable compulsory license pursuant to Section 111 of the Copyright Act of 1976.^{13/} Mountain seeks rehyphenation of the New York Market so that it can avoid having to indemnify cable operators against copyright liability as a condition to carriage of Station WMBC-TV beyond Newton's 35-mile specified zone.

TWC submits that the Commission's market hyphenation policies are not designed or intended to relieve a station from providing the copyright liability indemnification expressly contemplated by Congress when it adopted Section 614(b)(10)(B) of the Cable Television Consumer Protection and Competition Act of 1992.^{14/} Congress did not deem it necessary to amend the 1976 Copyright Act to ensure copyright-free carriage of all must-carry stations throughout their ADIs, nor did it direct the Commission to redesignate affected television markets to achieve this result. Instead, Congress provided a mechanism for a station to obtain carriage beyond its local service area by agreeing to

^{12/} Petition at 6.

^{13/} 47 U.S.C. § 111(c)(1).

^{14/} Pub. L. No. 102-385, 106 Stat. 1460 (1992).

indemnify the cable system against the additional copyright liability.

In adopting the new must-carry rules, the Commission refrained from making wholesale changes in the Section 76.51 list of top-100 television markets, recognizing that such changes or re-ranking the markets "would have significant implications for copyright liability".^{15/} The Commission's unwillingness to relieve all must-carry stations of potential copyright liability through wholesale changes in Section 76.51 of the Rules signifies its awareness that Congress did not intend the 1992 Cable Act to work any fundamental changes in the copyright law.^{16/} Mountain has failed to demonstrate any "particularized need" why it should be relieved of compliance with the copyright indemnification procedure intended by Congress to apply to stations such as WMBC-TV as a condition to carriage beyond their local service areas.

^{15/} Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, 8 FCC Rcd 2965 (1993) at 2978 ("Report and Order").

^{16/} It must be noted that the U.S. Copyright Office has initiated a Notice of Inquiry to consider whether it should adhere to Commission changes in Section 76.51 of its Rules. 58 Fed. Reg. 34594 (proposed June 28, 1993). The Copyright Office has made clear that it is not automatically bound to accept the Commission's market redesignations as changing "distant" stations into "local" stations for copyright liability purposes. Thus, there is a real possibility that a Commission market redesignation could leave a cable system naked without copyright indemnification but with a substantial copyright liability caused by mandatory carriage of the station involved. TWC submits that the Commission should not undertake massive market redesignations in the absence of definitive guidance from the Copyright Office with respect to the critical copyright liability issue.

Turning now to the fourth factor considered by the Commission in market hyphenation cases, i.e., a showing that the proposed change will benefit the public, Mountain has failed to meet its burden with respect to the New York City residents served by TWC. In paragraph 7 of the Notice, the Commission recites Mountain's assertion that the news, local public affairs and independent programming of WMBC-TV contributes particularly to the diversity of New Jersey television viewers. Assuming the validity of Mountain's characterization of its non-entertainment programming focus, this is as it should be. Station WMBC-TV is licensed to northern New Jersey and its programming should be designed to meet the needs and interests of viewers in this large area.^{17/}

Mountain makes no claim to serve the needs and interests of New York City and the program schedule filed as Attachment D to the Petition fails to disclose any programming of local interest to New Yorkers. Nor is there any cultural, social, economic, demographic commonality between Newton, New Jersey and New York City. Consequently, grant of Mountain's market rehyphenation request plainly would disserve TWC's subscribers who would lose an existing programming service to accommodate an out-of-state television station whose program

^{17/} Mountain notes that it is the only English-language commercial station licensed to northern New Jersey which does not employ a home shopping format. Mountain thus has a vital role to play in serving special needs of northern New Jersey.

schedule does not appear to offer anything of particular interest or diversity to TWC's subscribers.^{18/}

TWC has demonstrated conclusively hereinabove that Mountain's proposed rehyphenation of the New York Market to include Newton fails to satisfy the Commission's criteria for market hyphenations. TWC submits that because Mountain's proposal would have a sweeping impact on signal carriage requirements for many cable systems within the New York ADI, the Commission should also evaluate the proposal using the following criteria which are applicable to proposed modifications of ADI markets:

- (1) whether the station, or similarly situated stations, have been historically carried on the cable system or systems within such community;
- (2) whether the station is located close to the community in terms of mileage or signal carriage;
- (3) whether any other station that qualifies for carriage provides coverage of news or programming of local interest;
- (4) the local viewing patterns in both cable and noncable homes in the community.^{19/}

Mountain's proposed rehyphenation of the New York Market fails to meet these alternative criteria as well.

^{18/} TWC's systems carry a variety of locally-produced ethnic programming of specific interest to niche segments of its subscriber base. Such channels include all Korean, Chinese, Arabic, Indian and Greek programming which incorporate local news and affairs in their respective formats.

^{19/} Report and Order at ¶ 42, 47.

First, TWC has never carried Station WMBC-TV, a new station that began broadcast operations earlier this year. In addition, as TWC has stated hereinabove, Newton is located 44.73 miles from New York City, and the Station's Grade B contour barely covers all of the areas served by TWC. The principal, if not exclusive, news and public service programming orientation of Station WMBC-TV is toward the northern New Jersey area it is licensed to serve. WMBC-TV broadcasts no programming of local interest to TWC's subscribers.

With respect to the third criterion, i.e., service to the community in question by other must-carry stations, there can be no doubt that the plethora of network affiliated, independent and noncommercial stations licensed to New York City provide ample news, public affairs and public service programming directed to City residents. In addition, TWC produces a 24-hour program service called New York 1 News ("NY1"), which features in-depth coverage of news and community events in the five boroughs of New York City. NY1 is carried on all the franchised cable systems serving the City of New York, including those affiliated with TWC as well as the Cablevision systems serving Brooklyn and the Bronx. In sum, there is simply no programming void for Mountain to fill even if it were to broadcast programming related specifically to New York City.

Finally, although TWC does not have access to ratings data for Station WMBC-TV, in light of the Station's start-up status and distance to New York City, it can be assumed that

noncable viewing by City residents is virtually nonexistent. And, of course, WMBC-TV achieves no viewing in cable households.

In summary, Mountain clearly fails to meet the criteria used by the Commission in evaluating proposals for the modification of ADI markets under Section 76.59 of the Rules. In a recent decision, the Mass Media Bureau held that previous cable carriage, demonstrable programming service to the community in question and significant viewing in local cable and noncable households are essential to grant of a request to include a community within a station's ADI for purposes of mandatory cable carriage.^{20/} None of these factors is present in Mountain's proposal, thus demonstrating further the absence of any public interest justification for the addition of Newton to the New York Market.

II. Riverhead, New York

TWC opposes rehyphenation of the New York Market to include Riverhead, New York for the same reasons set forth above in opposition to the Newton proposal. The Petition for Rulemaking filed by WLIG-TV, Inc., licensee of Station WLIG(TV), fails to provide adequate justification for grant of the relief requested.^{21/}

^{20/} Act III Broadcasting of Nashville, Inc., DA-1440, released December 10, 1993 (Mass Media Bureau).

^{21/} TWC's cable systems serving Manhattan, Queens and western Brooklyn carry the programming of Station WLIG(TV) by means of a translator located in Mineola (W57BC).

TWC supports the Mass Media Bureau's suggestion in the Notice that waiver of Section 73.658 of the Rules would be an appropriate means to satisfy WLIG-TV's concerns short of rehyphenation of the market to include Riverhead.^{22/} A station-specific rule waiver would meet WLIG-TV's objectives and avoid the far-reaching consequences of market rehyphenation.

III. Secaucus, NJ, Bridgeport, CT, Poughkeepsie, NY, Kingston, NY, Smithtown, NY

The Mass Media Bureau has unilaterally requested comments on whether one or more of the following communities should also be added to the New York Market: Secaucus, Bridgeport, Poughkeepsie, Kingston and Smithtown. The current record in this proceeding, however, is totally devoid of any of the information and showings required by the Commission of a petitioner for market hyphenation. In the total absence of any such information, it is simply not possible for TWC to comment meaningfully on the multiple and varied rehyphenation possibilities. Accordingly, TWC expressly reserves the right to oppose the rehyphenation proposals in reply comments following review of showings made by interested television stations in their initial comments.

IV. Conclusion

Neither Mountain nor WLIG-TV, Inc. has satisfied the Commission's criteria for rehyphenation of the New York Market to include Newton, New Jersey and/or Riverhead, New York.

^{22/} Notice, ¶ 14.

Accordingly, TWC respectfully requests the Mass Media Bureau to reject the proposals and retain the Market's designation as now appears in Section 76.51 of the Rules.

Respectfully submitted,

**TIME WARNER NEW YORK
CITY CABLE GROUP**

By: *John R. Wilner*
John R. Wilner

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Its Attorneys

December 20, 1993

DECLARATION

Robert S. Jacobs, Vice President & General Counsel of Time Warner New York City Cable Group, does hereby declare, under penalty of perjury, that I have read the foregoing "Comments of Time Warner New York City Cable Group" and that except for those facts of which official notice may be taken by the Commission, the facts set forth therein are true and correct to the best of my knowledge, information and belief.

Executed this 17th day of December, 1993.

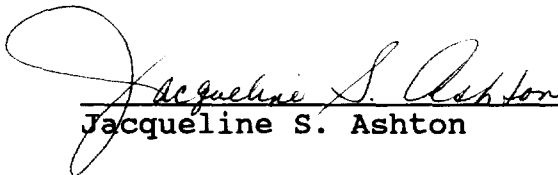

Robert S. Jacobs

CERTIFICATE OF SERVICE

I, Jacqueline S. Ashton, a secretary with the Law firm Bryan Cave, hereby certify that on this 20th day of December, 1993, a copy of the foregoing "**Comments Of Time Warner New York City Cable Group**" was sent first class mail, postage paid to the following:

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